IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 02-376-A
	)	
DENIS RIVERA,	)	
a/k/a "Conejo"	)	
NOE RAMIREZ-GUARDADO,	)	
a/k/a "Tricky"	)	
LUIS ALBERTO CARTAGENA,	)	
a/k/a "Scuby"	)	
Defendants.	)	
	)	

GOVERNMENT'S MOTION IN LIMINE
TO ADMIT MURDERED WITNESS' TESTIMONY

COMES NOW the United States of America by its United States Attorney for the Eastern District of Virginia, Paul J. McNulty, and Ronald L. Walutes, Jr., Michael E. Rich and Patrick F. Stokes, Assistant United States Attorneys, and respectfully files this Motion in Limine to Admit Murdered Witness' Testimony:

1. On Sunday evening, September 16, 2001, Denis Rivera and a former co-defendant, Andy Salinas, met the twenty year old victim, Joaquin Diaz, at the McDonald's Restaurant located in the 1400 block of North Beauregard Street in Alexandria, Virginia. The surveillance tape of that evening places all three men inside the restaurant. Shortly thereafter the victim followed the two MS-13 members to the gang's hang out in the Woodmont apartment complex in the 5500 block of North Morgan Street, Alexandria. There, after first sharing marijuana with their victim, the assembled MS-13 members persuaded Diaz to get into a car ostensibly to go to purchase additional marijuana. A second car carrying additional members departed separately to participate in this murder. The cars stopped at Daingerfield Island, which is United States Park

land immediately adjacent to the George Washington Memorial Parkway just south of Reagan National Airport and north of Old Town Alexandria. The gang members persuaded their victim to exit the car and join them in searching for other MS-13 members in the woods.

2. Once in the woods, the defendants set upon Diaz with knives, stabbing him numerous times and leaving him dead in the park. The victim suffered numerous defensive wounds on his hands and arms, and numerous stab wounds to his back, chest (one of which struck his heart), face and throat. His head was very nearly severed and his esophagus was excised and located on the path near his body. The medical examiner believes the victim would have lived through these wounds until his throat was removed by what appears to have been a household steak knife. The surveillance tape from the McDonald's camera includes both the time and date that the two MS-13 members first meet with the victim (September 16, 2001 shortly after 7 p.m.) and the Report of Investigation by Medical Examiner puts the time of death as the day before the examination, or sometime during the evening of September 16, 2001.

3. On July 9, 2003, the defendants, Denis Rivera, also known as "Conejo," Noe David Ramirez-Guardado, also known as "Tricky," and Luis Alberto Cartagena, also known as "Scuby," were arraigned on a two-count indictment charging them with Conspiracy to Commit Murder in violation of Title 18, United States Code, Section 1117 and Murder in violation of Title 18, United States Code, Section 2 and 1111.

4. On July 17, 2003, the decomposed body of Brenda Paz, also known as Smiley, was recovered from banks of the North Fork of the Shenandoah River in Shenandoah County, Virginia. She had been there for some time and her death has been ruled a homicide. Brenda Paz was a witness in United States v. Denis Rivera, et al, who would have testified at this trial on September 16, 2003. Government counsel had interviewed her and undertaken extensive steps to

ensure her safety pending the trial of this case. Denis Rivera and Andy Salinas each had confessed their involvement in the Diaz murder in the federal park near the airport to Ms. Paz. As far back as September 2002, the government had interviewed this witness in the presence of her attorney, Gregory Hunter. The government intends to call Mr. Hunter at this trial to testify as to what his client's statements were concerning the admissions of Denis Rivera. Mr. Hunter vividly recalls his client stating that Denis Rivera had told her that cutting the victim's throat in this case was just like cutting chicken. The government seeks to admit this testimony against Denis Rivera at trial. Because of the extensive evidence of Denis Rivera's complicity in the death of Brenda Paz,[1] these

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[1]March 7, 2003, recorded debriefing of Denis Rivera by the Arlington County Police Department. When asked about whether Brenda Paz would be killed, defendant Rivera responded "I got some people who would do it for me."

Recorded telephone call [Pending completion of a court certified translation, the government is using a law enforcement translation and no quotation markings are used] on May 14, 2003, at 11:51 a.m. between Denis Rivera, located at the Arlington County Detention Facility [there are posted signs informing inmates that there is no expectation of privacy on their telephone calls and that they may be monitored and recorded – this warning is verbally repeated at the beginning of each connected call from the Arlington County Detention Facility], and the "Philosopher," the juvenile J.L., also known as "Johnny". **Philosopher:** I think she's greasing you because she is asking me where I will be staying. What business is it of hers. * * * * **Rivera:** What did you tell her? **Philosopher:** I told her maybe I will stay on the streets. She said she would send me half the money now and the rest I can call her and tell her where I will be in Virginia and she will send me the rest. I think she wants to know where I'm going to be and she is ratting on us. **Rivera:** Don't worry, once she is here, it will be another story. **Philosopher:** Once she is there, it will be easy, she won't be talking. **Rivera:** No, not speaking "bah." It's true I think she is a rat. I'm going to test her and if the cops find out then I'll know. I will make something up and set her up. * * * * If she wants to play games, so will we. Then later if in a park we have to step on her then we'll do it. Seriously, fuck that shit. **Philosopher:** She was telling me to go buy my [bus] tickets now, but I'm not going now, maybe tomorrow. She might have set me up and the police could be waiting for me. How many people do you want? **Rivera:** Just two and at least one rifle but in another city because she shit on my banana and I had it so well planned. I will have that girl I told you about driving. **Philosopher:** Yes, I really believe she ratted on you. **Rivera:** Yes, but you know how I will hang her, I will call her and in a park we'll step on her, step on her so hard she won't be getting up. * * * * **Philosopher:** She's probably going to ask you where I will be staying. She seems too interested. **Rivera:** You know that when she goes I will tell her that all that go to the father [apparent religious reference] will go beyond to a beautiful place remember that worm [Diaz].

Recorded telephone call on May 13, 2003, at 10:18 p.m. between Rivera and the

statements are admissible pursuant to the Federal Rules of Evidence, specifically Rule 804(b)(6).

5. Brenda Paz's testimony concerning Denis Rivera's admissions are admissible pursuant to Fed. R. Evid. 804(b)(6), which provides the following exception to the hearsay rule where the declarant is unavailable:

> (6) **Forfeiture by wrongdoing**. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The established case law clearly stands for the proposition that the Rule is applicable where the government establishes by a preponderance of the evidence that the defendant procured the unavailability of the witness by wrongdoing. See United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) (showing by a preponderance of the evidence that the defendant procured the absence

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Philosopher. **Rivera:** To hell with that fucking bitch, I think she shit on my banana. **Philosopher:** I know, I didn't say anything to her. **Rivera:** Also I think a guy in here who I trusted, we grew apart and it seems my [escape] plan has been detected...**Philosopher:** I heard she's working with the cops....**Rivera:** If you come here be careful. Lucia [Lucifer] is ratting also, and Tricky has gotten charges and he can say anything to get off. Talk to her about an abortion because it will hurt me more if one day I come and put it on her and two have to go, its better if its just one. * * * * But I don't know, I am still undecided about what to do about her. * * * * Find out how she started to talk to the lawyer and why. Be careful, she's not stupid. She is intelligent, but for being intelligent, she's going to get fucked.

Recorded telephone call on July 3, 2003, at 10:45 p.m. between Rivera and Payaso. **Payaso:** Hello? I spoke to Johnny on the internet and he said he has something important to tell you about Smiley, but he couldn't tell me. **Rivera:** Did she disappear? **Payaso:** I don't know, he couldn't say. * * * * **Rivera:** What happened to Smiley? **Payaso:** I don't know. He said he would send you a letter. **Rivera:** Send me a letter!

Recorded telephone call on July 3, 2003, later in the same call, between Rivera and Johnny, also known as the Philosopher. **Philosopher:** Hello? **Rivera:** What's up? **Philosopher:** You heard about Smiley? About the [green] light on her? They have her. They are going to do it soon. Recorded telephone call on July 29, 2003, at 10:24 p.m. between Rivera and Monica. **Monica:** Hello? **Rivera:** Hey, did you hear what happened, charro churra, about Smiley don't make noise? **Monica:** No, what happened? **Rivera:** That she went to the other side (laughs). **Monica:** Who? **Rivera:** You go rat on Conejo and (laughing). **Monica:** She ratted, that bitch. **Rivera:** No, how could she (laughing), how if she's on the otherside under....You rat on me and those that rat (laughs).

of the witness); United States v. Dhinsa, 243 F.3d 635, 653 (2d Cir.), cert. denied, 122 S.Ct. 219 (2001); United States v. Emery, 186 F.3d 921, 927 (8th Cir. 1999) (preponderance standard); United States v. Cherry, 217 F.3d 811, 815 (10th Cir. 2000)(preponderance standard); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996)(preponderance standard for pre-rule waiver by misconduct).

6. Either prior to trial at an evidentiary hearing (see Dhinsa), or at trial (contingent upon proof of the murder by a preponderance of the evidence, see Emery, the preferred approach of the government to avoid the waste of judicial resources in presenting the evidence twice), the government must establish by a preponderance of the evidence that the defendant procured the unavailability of the declarant and that he acted with the intent to procure the declarant's unavailability as an actual or potential witness. Dhinsa, 243 F.3d at 653-54. The government is not required to show that the defendant's sole motivation was to procure the witness' absence, "rather, it need only show that the defendant 'was motivated *in part* by a desire to silence the witness.'" Dhinsa, 243 F.3d at 654 (quoting Houlihan, 92 F.3d at 1279); see United States v. Johnson, 219 F.3d 349, 355-56 (4th Cir. 2000) (the Fourth Circuit noted that the defendant killed the declarant at least in part to silence the only eyewitness).

7. In addition, as noted in several published opinions, this type of procedure is not unusual. Indeed, it is completely consistent with the approach used by courts when considering the introduction of co-conspirator statements. The evidence is conditionally admitted subject to proof by a preponderance of the evidence that the defendant and the declarant were co-conspirators. Emery, 186 F.3d at 926; United States v. White, 116 F.3d 903, 911-12 (D.C. Cir. 1997); Houlihan, 92 F.3d at 1280. Indeed, the Fourth Circuit has repeatedly permitted the introduction of co-conspirator statements upon a showing by a preponderance of the evidence.

United States v. Neal, 78 F.3d 901, 904-05 (4th Cir.), cert. denied, 117 S. Ct. 152 (1996); United States v. Blevins, 960 F.2d 1252, 1255 (4th Cir. 1992). A court may conditionally admit the statement even before an evidentiary foundation is laid, as long as the evidence is subsequently admitted. Blevins, 960 F.2d at 1256. The Fourth Circuit does not require a pretrial hearing to determine the admissibility of the statements. United States v. Hines, 717 F.2d 1481, 1488 (4th Cir. 1983), cert. denied, 467 U.S. 1214 (1984). In Dhinsa, the victim was targeted because of his active or potential cooperation with the police. Dhinsa claimed that the district court erred in admitting hearsay statements of the victims during their murder trial. The Second Circuit rejected this attempt to limit the use of hearsay statements of victims to only a prior proceeding. "Adoption of Dhinsa's proposed limitation would limit proof against him– the very result that the waiver-by-misconduct doctrine seeks to remedy." Id. at 653. The court explicitly held that Rule 804(b)(6) does not "limit the subject matter of the witness' testimony to past events or offenses the witness would have testified about had he been available." Id. at 652. The Second Circuit noted that the pre-rule cases declined to read in such a limitation and was unwilling to add such a requirement to the rule. "We hold that Rule 804(b)(6) places no limitation on the subject matter of the declarant's statements that can be offered against the defendant at trial to prove that the defendant murdered the declarant." Id. at 653. See United States v. Johnson, 219 F.3d 349 355-56 (4th Cir. 2000) (the Fourth Circuit held that statements of the victim who was killed, in part, to avoid his potential testimony against the defendants, were properly admissible under Rule 804(b)(6)).

8. The defendant in Emery was convicted following trial for the killing of a federal informant and claimed on appeal that Rule 804(b)(6) applied only in a trial on the underlying charges about which he feared the witness would testify and not in a trial for murdering her. The

Eighth Circuit clearly and explicitly rejected this argument. Emery, 186 F.3d at 926. Emery was charged with killing the victim who was cooperating with federal officials in an investigation of Emery's drug trafficking activities. In his trial for the murder of the witness, the prosecution presented hearsay statements of the victim, who had provided information about the defendant and attempted to record conversations with the defendant. The substance of her testimony centered on her statements about his involvement in drug trafficking and her fear that he would retaliate against her. The defendant contended on appeal that the district court improperly admitted these statements in his murder trial although they may have been admissible in a possible drug case against him. The Eighth Circuit began its analysis by noting that "the right of confrontation is forfeited with respect to any witness or potential witness whose absence a defendant wrongfully procures." Emery, 186 F.3d at 926. Rejecting the defendant's position that the hearsay statements could only be used in a possible drug case and not the murder case, the Eighth Circuit was unwilling to allow Emery to benefit from his wrongdoing.

> We believe that both the plain meaning of Fed.R.Evid. 804(b)(6) and the manifest object of the principles just outlined mandate a different result. The rule contains no limitation on the subject matter of the statements that it exempts from the prohibition on hearsay evidence. Instead, it establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness.

Id. at 926.

9. All circuits to have considered the matter have found that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness. See United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997). In United States v. Thai, 29 F.3d 785 (2nd Cir. 1994), a constitutional waiver case, the defendants were charged with a series of violent crimes, including conspiracy to murder one of the witnesses to another crime. The Second Circuit affirmed the use of the dead declarant's statements to the police as

evidence to support the convictions of the defendants for the conspiracy to murder charge. Citing to an earlier case of United States v. Mastrangelo, 693 F.2d 269 (2nd Cir. 1982), for the proposition that the United States Supreme Court has repeatedly recognized that a defendant may waive his right to confrontation by misconduct, the Second Circuit noted that the statements need not be sworn or under oath and permitted the introduction of unsworn statements by the deceased declarant to the police. Thai, 29 F.3d at 814.

10. Finally, in United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), a case in which the defendant was charged with conspiring to murder a principal witness against him, the Fifth Circuit admitted hearsay statements by the principal witness under the constitutional waiver doctrine. The statements of the murdered witness included both grand jury testimony and statements to the FBI. The Fifth Circuit held that a defendant who causes a witness to be unavailable waives his right to confrontation. Id. at 630. "When confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution 'would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause,' and make a mockery of the system of justice that the right was designed to protect." Id.

11. As noted in United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976), "[t]he Sixth Amendment does not stand as a shield to protect the accused from his own misconduct and chicanery." The First Circuit stated the position even more forcefully in Houlihan, 92 F.3d at 1279, "courts will not suffer a party to profit by his own wrongdoing." The strength of these statements is amplified in an unusually telling point acknowledged by the Sixth Circuit. "Our research has disclosed no case in which a court upon a finding of wrongful conduct has declined

to admit prior statements that would have come in had the witness taken the stand." Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982). Nor has the government found any case during its research of cases after 1982 that has declined to admit prior statements of a deceased witness against the wrongdoer. Therefore, because the rule does not limit the use of the statements to only prior proceedings, case law (both prior constitutional waiver cases and recent Rule 804(b)(6) cases) has explicitly permitted the hearsay statements to be used as evidence in the murder case giving rise to the exception, and the intent of the rule and public policy behind the rule is furthered by this position, the statements of Brenda Paz are properly admissible in the prosecution of Denis Rivera.

12. In a pre-rule waiver by misconduct case that is repeatedly cited as well-reasoned precedent, the First Circuit held that the waiver applied with equal force to actual or even potential witnesses. Houlihan, 92 F.3d at 1279. At the time that the defendants in that case murdered the victim, there were no charges even pending against the defendants and no grand jury investigation had even been convened. Id. The First Circuit stated that "we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a *potential* witness." Id. Of course, the fact pattern before this Court is much more direct. The defendant had been transferred to adult status by this Court, that order had been affirmed by the Fourth Circuit and he had been indicted all before the time of this witness' murder. The lead government prosecutor personally interviewed this witness and she was placed under very significant protection at the request of the United States Attorney's Office.

WHEREFORE, the United States asks the Court to grant this Motion in Limine and admit the statements of Brenda Paz as to the defendant Rivera.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2003, a true and correct copy of the foregoing Motion in Limine to Admit Murdered Witness' Testimony was delivered by mail via first class mail, postage prepaid thereon, to the following attorneys of record:

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